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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWYER CAMPBELL,)	Case No. CV 11-5727-GHK (OP)
Petitioner,)	
v.)	MEMORANDUM AND ORDER RE:
T. BANKS and B.O.P.,)	TRANSFER OF ACTION TO THE
Respondent.)	UNITED STATES DISTRICT COURT
)	FOR THE EASTERN DISTRICT OF
)	MISSOURI

I.

PROCEEDINGS

On July 13, 2011, Lawyer Campbell ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody pursuant to 28 U.S.C. § 2241 ("Petition"). (ECF No. 1.) On August 24, 2011, Respondent filed a Motion to Dismiss the Petition. (ECF No. 4.) On January 13, 2012, Petitioner filed an Opposition to the Motion to Dismiss. (ECF No. 8.) After a review of the Motion, Opposition, and supporting declarations and exhibits, the Court has determined that this matter should be transferred to the United States District Court for the Eastern District of Missouri.

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1 **II.**

2 **PROCEDURAL HISTORY**

3 On April 28, 2004, Petitioner was convicted after a jury trial in the Eastern
 4 District of Missouri of four drug trafficking offenses and two additional offenses,
 5 both involving possession of firearms in furtherance of the drug trafficking
 6 offenses. (ECF No. 4 Schuh Decl. ¶ 4A.) On August 24, 2004, Petitioner was
 7 sentenced to a four-month term of imprisonment for violating 21 U.S.C. §
 8 841(a)(1) (possession with intent to distribute marijuana) (Counts 1, 4), and 21
 9 U.S.C. § 844(a) (possession of methylenedioxymethamphetamine (ecstasy) and
 10 heroin) (Counts 3, 6), and to a 360-month, statutorily-required consecutive term
 11 for violating 18 U.S.C. § 924(c) (possessing a firearm in furtherance of a drug
 12 trafficking crime) (Counts 2 (sixty months), 6 (300 months).) (ECF No. 4 Schuh
 13 Decl. ¶ 4A.)

14 Petitioner appealed the judgment and sentence to the United States Court of
 15 Appeals for the Eighth Circuit. (Case No. 4:03-cr-499-SNL ECF No. 73.) On
 16 April 25, 2005, the Eighth Circuit affirmed Petitioner's convictions and sentences.
 17 (Id. ECF No. 90.)

18 Petitioner did not file a Motion to Vacate, Set Aside or Correct Sentence by
 19 a Person in Federal Custody pursuant to 28 U.S.C. § 2255 in the Eastern District
 20 of Missouri. (ECF No. 4 at 3.)

21 Petitioner is currently incarcerated at the Federal Correctional Institution II
 22 in Victorville, California. (Id. Schuh Decl. ¶ 4B.)

23 **III.**

24 **PETITIONER'S CLAIMS**

25 Petitioner seeks habeas relief pursuant to 28 U.S.C. § 2241 and raises the
 26 following claims:

- 27 (1) Petitioner is actually innocent of the crime of possessing a firearm in
 28 furtherance of a drug trafficking offense, based on the fact that one or

more of the arresting officers (Officers Schwerb and Matthews) were allegedly disciplined by the St. Louis Police Department and this newly discovered evidence makes it clear his testimony at trial was unreliable (Pet. Mem. P. & A. at 1);

- (2) (a) The judge was without jurisdiction to impose a sentence of twenty-five years on Count Six because a defendant cannot be tried on charges that are not made in the indictment against him, and Petitioner was sentenced pursuant to a superseding indictment which the government failed to present to a grand jury (*id.* at 6-7);
- (b) Petitioner raises Booker¹ and Apprendi² challenges to his two firearm possession convictions (*id.* at 6-12); and
- (c) Petitioner is actually innocent of the two firearm possession convictions because to “use” a firearm requires “actual employment” of the firearm (*id.* at 12 (citation omitted)).

IV.

DISCUSSION

A. Petitioner’s Claims Are More Properly Brought Under 28 U.S.C. § 2255.

A federal prisoner challenging the validity or constitutionality of his conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000). Only the sentencing court has jurisdiction over a §

¹ United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)

² Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

1 2255 motion, in this case, the Eastern District of Missouri. Id.; Tripati v. Henman,
2 843 F.2d 1160, 1163 (9th Cir. 1988). A federal prisoner challenging the manner,
3 location, or conditions of that sentence's execution must bring a habeas corpus
4 petition pursuant to 28 U.S.C. § 2241. Hernandez, 204 F.3d at 864. Respondent
5 contends that the Petition is more properly brought under § 2255 because
6 Petitioner is attacking the validity of his underlying conviction and sentence,
7 rather than the execution of his sentence. (ECF No. 4 at 4-6.) This Court agrees.

8 Although Petitioner has filed the current Petition as a habeas corpus petition
9 pursuant to § 2241, he is actually challenging the legality of the sentence imposed
10 rather than the manner in which his sentence has been executed. See, e.g., United
11 States v. Sanger 24' Spectra Boat, 738 F.2d 1043, 1046 (9th Cir. 1984) (moving
12 party's label for motion is not controlling; court will construe motion to be the
13 type proper for relief requested). The substance of each of Petitioner's claims is
14 that he is actually innocent of the 18 U.S.C. § 924(c)(1) (use of a firearm)
15 convictions. His claims attack the validity of his underlying conviction and
16 sentence or the judge's authority to impose the sentence, rather than the execution
17 of his sentence. Thus, the claims are more properly the subject of a motion
18 brought under § 2255.

19 Under the savings clause of § 2255, a federal prisoner may file a habeas
20 corpus petition pursuant to § 2241 to contest the legality of a sentence where his
21 remedy under § 2255 is "inadequate or ineffective to test the legality of his
22 detention." Id. at 864-65 (quoting 28 U.S.C. § 2255(e)); see also Moore v. Reno,
23 185 F.3d 1054, 1055 (9th Cir. 1999). However, the Ninth Circuit has recognized
24 that this is a narrow exception. United States v. Pirro, 104 F.3d 297, 299 (9th Cir.
25 1997). Ultimately, the burden is on the petitioner to show that the remedy is
26 inadequate or ineffective. Redfield v. United States, 315 F.2d 76, 83 (9th Cir.
27 1963).

28 The Ninth Circuit has consistently held that the savings clause is not

1 available to petitioners who are merely attempting to circumvent § 2255's gate-
2 keeping requirements. See, e.g., Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir.
3 2006) (claim not based on new rule of constitutional law nor on newly discovered
4 evidence was improper second or successive motion); Ivy v. Pontesso, 328 F.3d
5 1057, 1059 (9th Cir. 2003) ("§ 2255's remedy is not 'inadequate or ineffective'
6 merely because § 2255's gatekeeping provisions prevent the petitioner from filing
7 a second or successive petition . . .") (citation omitted); United States v.
8 Valdez-Pacheco, 237 F.3d 1077, 1080 (9th Cir. 2001) ("A prisoner may not
9 circumvent valid congressional limitations on collateral attacks [under § 2255] by
10 asserting that those very limitations create a gap in the post-conviction remedies
11 that must be filled by the common law writs."); Moore, 185 F.3d at 1055
12 (concluding that § 2255 is not inadequate or ineffective merely because a
13 particular prisoner's § 2255 motion is procedurally barred). Thus, the inability of
14 a petitioner to meet the gate-keeping requirements for a second or successive §
15 2255 motion does not render § 2255 an inadequate or ineffective remedy.

16 Nor is the fact that Petitioner alleges he is "actually innocent" of the crimes
17 for which he was convicted sufficient to allow him to proceed under § 2241. The
18 Ninth Circuit has held that a prisoner who wishes to use a § 2241 petition as a
19 substitute for a § 2255 motion must show that he is actually innocent of the
20 charges against him and that he "has never had an unobstructed procedural shot at
21 presenting [his] claim." Ivy, 328 F.3d at 1060 (citation omitted) (internal
22 quotation marks omitted). As noted by the Ninth Circuit, "it is not enough that the
23 petitioner is presently barred from raising his claim of innocence by motion under
24 § 2255. He must never have had the opportunity to raise it by motion." Id.

25 In this case, Petitioner filed a direct appeal but did not file a § 2255 motion.
26 In the direct appeal, Petitioner alleged that the mandatory minimum sentence
27 pursuant to § 924(c) was cruel and unusual punishment and that the trial court
28 erred in denying defense counsel's request for a mistrial after the prosecutor

1 allegedly made a burden-shifting argument. (Pet. at 3.) Then, on March 24, 2010,
2 the federal public defender wrote a letter to Petitioner stating that Officer Schwerb
3 had been involved in the “World Series ticket scandal,” in which a number of St.
4 Louis police officers allegedly took illegal tickets for the 2006 World Series from
5 scalpers outside Busch Stadium and gave them to family and friends rather than
6 turning them in as evidence.³ (Pet. at 42.)⁴ The letter also indicated that a second
7 officer involved in Petitioner’s arrest, Mathews, had come under suspicion “in the
8 last year” for possibly falsifying information in search warrant applications –
9 although the officer was not prosecuted, a number of pending cases in which
10 Mathews was the arresting officer had been dismissed. (Id. at 42.)

11 Petitioner subsequently contacted his appellate counsel to find out whether
12 his appeal could be re-opened. (Id. at 41.) In a letter dated July 1, 2010, counsel
13 informed Petitioner that he might be able to file a § 2255 petition raising these
14 issues, even though his conviction became final on June 23, 2005, and the one-
15 year statutory deadline for filing such a petition had passed, “since knowledge of
16 the corruption did not come to light until much later.”⁵ (Id.) The Petition here
17 was filed on July 13, 2011.

18 Petitioner fails to show that a remedy under § 2255 is “inadequate or
19 ineffective.” Petitioner does not show he never had an “unobstructed procedural
20 shot” at presenting his claims. Petitioner did not previously file a § 2255 motion
21

22
23 ³ As a result of the World Series ticket incident, which took place in spring
24 of 2007, Officer Schwerb was demoted. (Pet. Mem. P. & A. at 1); see also United
States v. Beck, 557 F.3d 619, 621 (8th Cir. 2009).

25 ⁴ Because the exhibits attached to the Petition do not have page numbers,
26 the Court uses the ECF-generated page number for ease of reference to the
27 exhibits.

28 ⁵ Counsel provided Petitioner with a § 2255 form.

1 challenging his conviction. Because Petitioner has not been denied an
2 unobstructed procedural opportunity to present his claims, the Court need not
3 address Petitioner's claim of actual innocence. See Ivy, 328 F.3d at 1061.

4 Based on the foregoing, the savings clause of § 2255 does not apply, and the
5 Petition is properly construed as a § 2255 motion. Section 2255 motions must be
6 heard in the sentencing court. 28 U.S.C. § 2255(a); Hernandez, 204 F.3d at
7 864-65. Because this Court is only the custodial court and construes the Petition
8 as a § 2255 motion, this Court lacks jurisdiction over the Petition. Hernandez, 204
9 F.3d at 864-85.

10 **B. Dismissal or Transfer of the Petition.**

11 Title 28 U.S.C. § 1631 governs the transfer of civil actions to cure
12 jurisdictional defects, and is the proper statute the Court must utilize for lack of
13 jurisdiction over a habeas petition.⁶ See Hernandez, 204 F.3d at 865 n.6. Transfer
14 is appropriate under § 1631 if three conditions are satisfied: (1) the transferring
15 court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction
16 at the time the action was filed; and (3) the transfer is in the interest of justice.
17 Cruz-Aguilera v. INS, 245 F.3d 1070, 1074 (9th Cir. 2001). The Court must
18 decide whether the Petition should be dismissed or transferred to the sentencing
19 court, the Eastern District of Missouri.

20
21 ⁶ Title 28 U.S.C. § 1631 states:

22 Whenever a civil action is filed in a court as defined in section
23 610 of this title or an appeal, including a petition for review of
24 administrative action, is noticed for or filed with such a court and that
25 court finds that there is a want of jurisdiction, the court shall, if it is in
26 the interest of justice, transfer such action or appeal to any other such
27 court in which the action or appeal could have been brought at the time
28 it was filed or noticed, and the action or appeal shall proceed as if it had
been filed in or noticed for the court to which it is transferred on the date
upon which it was actually filed in or noticed for the court from which
it is transferred.

1 As discussed, the transferring court, the Central District of California, lacks
2 jurisdiction over the Petition.

3 The transferee court, the Eastern District of Missouri, could have exercised
4 jurisdiction at the time the action was filed in this Court on July 13, 2011. As the
5 sentencing court, the Eastern District of Missouri could hear Petitioner's attack on
6 his conviction and sentence through a § 2255 motion. 28 U.S.C. § 2255(a).

7 It is not altogether clear whether this action is time-barred. Respondent
8 concedes that pursuant to § 2255(f) Petitioner has a year after discovering new
9 evidence to file a motion, and "might still be afforded the opportunity to file a §
10 2255 motion . . . before the sentencing Court in the Eastern District of Missouri . .
11 ." (ECF No. 4 at 10.) Moreover, the federal habeas statute of limitations bar is an
12 affirmative defense and is not jurisdictional. Day v. McDonough, 547 U.S. 198,
13 205, 209-10, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006).

14 It also does not appear that the current Petition is a "second or successive" §
15 2255 motion that would deprive the Eastern District of Missouri of jurisdiction
16 because Petitioner has not previously filed a § 2255 motion.⁷ Burton v. Stewart,
17 549 U.S. 147, 152, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007) (per curiam) (stating
18 second or successive habeas petition without appellate court authorization
19 deprives court of jurisdiction); Cooper v. Calderon, 274 F.3d 1270, 1274-75 (9th
20 Cir. 2001) (same).

21 Finally, a transfer of the Petition would be in the interest of justice.
22 Cruz-Aguilera, 245 F.3d at 1074. "Normally transfer will be in the interest of
23 justice because normally dismissal of an action that could be brought elsewhere is
24 time consuming and justice-defeating." Id. (citation omitted) (internal quotation
25

26
27 ⁷ Because Petitioner brings a "disguised" § 2255 motion instead of a
28 legitimate § 2241 petition, the second or successive analysis applies. See Harrison
v. Ollison, 519 F.3d 952, 961-62 (9th Cir. 2008).

1 marks omitted). “When determining whether transfer is in the interest of justice,
2 courts have considered whether the failure to transfer would prejudice the litigant,
3 whether the litigant filed the original action in good faith, and other equitable
4 factors.” Id. Here, transfer would serve the interest of justice by preventing
5 unnecessary delay caused by requiring Petitioner to re-file the Petition in the
6 Eastern District of Missouri. In addition, other than the question of whether the
7 Petition was timely filed, there is nothing to indicate that Petitioner did not file the
8 Petition in good faith.

9 V.

10 **ORDER**

11 IT IS THEREFORE ORDERED that: (1) this matter is transferred to the
12 United States District Court for the Eastern District of Missouri in the furtherance
13 of justice; and (2) Respondent’s Motion to Dismiss is DENIED as moot.

14
15 DATED: 2/8/12


16 HONORABLE GEORGE H. KING
United States District Judge

17 Presented by:

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20 HONORABLE OSWALD PARADA
21 United States Magistrate Judge
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